IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 3RD JULY 2007 / 12TH ASHADHA 1929

CRL.A.No. 2027 of 2006()

CC.234/2005 ON THE FILE OF THE JUDICIAL MAGISTRATE OF THE FIRST CLASS-V, NEYYATTINKARA

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APPELLANT: COMPLAINANT

R.NADARAJAN,
ISWARYA, POOVAR ROAD,
NEYYATTINKARA, THIRUVANANTHAPURAM.

BY ADV. SRI.T.RAJASEKHARAN NAIR

RESPONDENTS: ACCUSED & STATE:

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1. PRADEEP KUMAR K.,
T.C.8/1595, CHEKKALAVILAKATHU PUTHEN VEEDU,
KOSACODE, THIRUMALA P.O.,
THIRUVANANTHAPURAM.

2. STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.THIRUMALA P.K.MANI FOR R1
P.P.SRI.PUZHAKKARA MUHAMMED FOR R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. Thankappan, J.

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Crl.A. No. 2027 of 2006

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Dated this the 3rd day of July, 2007

JUDGMENT

The appeal is filed by the complainant against the acquittal order passed in C.C.No.234/2005 on the file of the Judicial Magistrate of the First Class-V, Neyyattinkara. In the order it is stated that the appellant absent for the last four postings and the case was posted for adducing evidence in all the postings. The learned counsel for the appellant submits that the case was originally filed before the Munsiff-Magistrate Court-II and as the Presiding Officer was on long leave, the case was shifted to the Judicial Magistrate of the First Class -VI. It is submitted that non-appearance of the appellant was mainly due to a mistake committed by the Clerk of the counsel appearing before the court below in recording the correct court in which the case was transferred. It is also submitted that the non-appearance of the appellant was not willful laches or negligence on the part of the appellant and an application was filed for excusing the absence of the appellant.

2. Considering the arguments of the learned counsel for the appellant and considering the facts and circumstances of the case, this Court is of the

view that the order under challenge is not in accordance with the principles laid down by this Court in decisions reported in Don Bosco V. Partech Computers Ltd. (2005(2) KLT 1003), G.F.S. Chits & Loans (P) Ltd. V. Rajesh (2006(3) KLT 825) and a decision of the Apex Court reported in Associated Cements Co. Ltd. V. Keshwanand (1998(1) KLT 179 (S.C.). As per the principles laid down in Don Bosco V. Partech Computers Ltd. (Supra), when the presence of the complainant was quite unnecessary, the Magistrate could proceed with the case by adjourning the same even if there was no representation from the counsel, the Magistrate should have adjourned the case, particularly when steps under section 82 and 83 of the Cr.P.C. were pending against the accused. In G.F.S.Chits & Loans (P) Ltd. V. Rajesh (Supra) this Court held that the courts should also bear-in-mind that unmerited, thoughtless disposal gives wrong signal to the society, staking even public confidence in the system of administration of justice. In 1998(1) KLT 179 (Supra) the Apex Court held that as follows:-

> "17. Reading the section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate considers that personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court

> notices that complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

3. In the above circumstances, this Court is of the view that the order under challenge is liable to be set aside and the matter has to be remitted to the trial court for fresh consideration. Ordered accordingly. The trial court is directed to consider the matter afresh as per law.

The appeal is allowed as above.

The parties shall appear before the court below on 18-8-2007

The records of the case shall be forwarded to the trial court forthwith.

K. Thankappan,
Judge.

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It is relevant to note that only because of the absence of the appellant, the 1st respondent is dragged to this Court. Hence, it is only proper for this Court to allow a reasonable costs to the 1st respondent. Therefore, the appellant is directed to deposit before the court below an amount of Rs.2,000/- on or before the date of posting of the case. If the amount is deposited, the 1st respondent is permitted to withdraw the same.

K. Thankappan,J.

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Crl.A.349/2003

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Judgment
29-3-2007